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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No 300

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia, A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON, and JOHN L. GLENN,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

Appellants' Reply to Supplemental Memorandum of Appellees

EUGENE COOK,
Attorney General of Georgia,
132 Judicial Building,
40 Capitol Square,
Atlanta, Georgia
E. FREEMAN LEVERETT,
Deputy Assistant Attorney General,
Elberton, Georgia,
Attorneys for Appellants, Ben W. Fortson, Jr., Secretary of State, et al.

TABLE OF CONTENTS

INDEX

		Page
I.	The Case Is Not Moot	1
II.	The District Court Was Without Power To Enjoin Submission Of The Proposed Constitution	6
III.	State Court Determination Of The State Law Question	10
IV.	Conclusion	11

TABLE OF AUTHORITIES

Cases

Amalgamated Association v. Wisconsin Employment Relations Board, 340 U. S. 416 (1951) 3

Blackman v. Stone, 17 F. Supp. 102 (D. C. Ill. 1936) 2

Buckley v. Hoff, 234 F. Supp. 191 (D. C. Vt. 1964) .. 7

Division 1287 Amalgamated Association v. Missouri, 374 U. S. 74 , 78 (1963) 3

Drew v. Scranton, 229 F. Supp. 308 (D. C. Pa. 1963) 6

Federal Trade Commission v. Goodyear Tire & Rubber Co., 304 U. S. 257 (1938) 3

J. I .Case Co. v. N.L.R.B., 321 U. S. 332 (1944) 2

Johnson v. Genessee County, Michigan, 232 F. Supp. 563 (D. C. Mich. 1964) 7

Jones v. Montague, 194 U. S. 147 (1904) 2

Page

Louisiana Power & Light Co. v. Thibodaux, 360 U. S. 25 (1959) 11

Love v. Griffith, 266 U. S. 32 (1924) 2

Lucas v. The Forty-Fourth General Assembly, 377 U. S. 713 (1964) 7

Mills v. Green, 159 U. S. 651 (1895) 2

Mississippi v. Johnson, 4 Wall. 475, 500 (1866) 6

McChord v. L&N Railroad Co., 183 U. S. 483, 495-6 (1902) 6

N.L.R.B. v. Greyhound Lines, 303 U. S. 261 (1938) .. 3

New Orleans Waterworks Co. v. New Orleans, 164 U. S 471, 481 (1896) 6

Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 228 (1908) 6

Richardson v. McChesney, 218 U. S. 487 (1910) 2

Scott v. Sandford, 19 How. 323 11

Scranton v. Drew, —— U. S. ——, 33 L. W. 3181 (1964) 6

Southern Pacific Co. v. I.C.C., 219 U. S. 433, 452 (1911) 3

Southern Pacific Terminal Co. v. I.C.C., 219 U. S. 498, 514 (1911) 2

State ex rel Cranmer v. Thorson, 9 S. D. 149, 68 N. W. 202 (1896) 6

Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227 (1869). 9

Thigpen v. Myers, ——F. Supp—— (D. C. Wash) .. 7

United States Alaska Steamship Co., 253 U. S. 113 (1920) 5

Page

United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897) 3

Wheeler v. Board of Trustees of Fargo School District, 200 Ga. 323, 37 S. E. 2d 322 (1946) 10

Statutes

Constitution of Georgia 1945:
Art. XII, Sec. I 3

Georgia Code Ann.:
§ 3-601 10

28 USCA 2283 10

Textbooks

Graves, State Constitutional Revision, p. 25 et seq. (1960) 8

National Municipal League, Model State Constitution (6th Edition 1963) 5

National Municipal League, Model State Constitution, p. 19, 104 (6th Ed. 1963) 8

National Municipal League, Salient Issues of Constitutional Revision, p. 55 (1961) 8

MISCELLANEOUS

Opinion of Attorney General of Georgia

Opinion of the Attorney General of Georgia May 28, 1964 10-11

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APPELLANTS' REPLY TO SUPPLEMENTAL MEMORANDUM OF APPELLEES

I

The Case Is Not Moot

The order here having enjoined submission of a proposed new state constitution **"at any subsequent election** until the General Assembly is reapportioned

in accordance with constitutional standards" (R. 200), this case manifestly differs from **Mills v. Green,** 159 U. S. 651 (1895), **Blackman v. Stone,** 17 F. Supp. 102 (D. C. Ill. 1936), vacated 300 U. S. 641 (1937); **Jones v. Montague,** 194 U. S. 147 (1904); **Richardson v. McChesney,** 218 U. S. 487 (1910), and **Love v. Griffith,** 266 U. S. 32 (1924), relied upon by appellees. In each of these latter cases, the injunctive relief sought **related to a particular election only,** which had been held pending appeal. As stated in **Southern Pacific Terminal Co. v. I.C.C.,** 219 U. S. 498, 514 (1911), referring to the line of cases relied upon by appellees:

> ". . . But in those cases the Acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected."

In the case at bar, the injunction relates "to any future election . . .," and not merely to the election held in November, 1964. Where, as here, an order imposes an "obligation" of a "continuing character," the case is not moot. **J. I. Case Co. v. N.L.R.B.,** 321 U. S. 332 (1944). The mere fact that the injunction was obeyed at a time in the past (here, the 1964 election) does not moot the case, because "(A)n order of the character made . . . does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

N.L.R.B. v. Greyhound Lines, 303 U.S. 261 (1938); **Amalgamated Association v. Wisconsin Employment Relations Board**, 340 U.S. 416 (1951); **United States v. Trans-Missouri Freight Association**, 166 U.S. 290 (1897); **Federal Trade Commission v. Gooodyear Tire & Rubber Co.**, 304 U.S. 257 (1938). Even where an injunctive order is vacated, the case is not moot where the underlying controversy has not been settled. **Division 1287, Amalgamated Association v. Missouri**, 374 U.S. 74, 78 (1963), and see **Southern Pacific Co. v. I.C.C.**, 219 U.S. 433, 452 (1911).

The fact that the controversy is far from settled here is borne out by Appellees' Supplemental Memorandum, where it is unequivocally stated that should the General Assembly seek to submit a new constitution prior to reapportionment, the appellees "would fully expect to apply to the district court to restrain its submission" (p. 6). No doubt such an injunction would be sought by appellees or some other litigants at a late hour shortly before the 1966 General Election[1] at a date when sufficient time would not remain to secure review by this Court. This was precisely the type of situation condemned in **Southern Pacific Terminal Company v. I.C.C.**, 219 U.S. 498, 514 (1911), where, in holding subject to review an order of the Commission notwithstanding that it had expired by its own terms, this Court declared:

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[1] Under the existing state constitution, Art. XII, Sec. 1, proposed constitutional measures can be submitted to the voters only in the November General Election held in even-numbered years.

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and those considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carrier, have their rights determined by the Commission without a chance of redress."

In short, an injunctive order properly is vacated only when the controversy is already moot; the order should not be vacated for the express purpose of avoiding review and thereby making it moot. No more pernicious doctrine could be concocted than for a court, either trial or appellate, alternately and successively, to vacate and reinstate an injunctive order simply as a means of avoiding review.

Moreover, the fact that a somewhat differently-composed General Assembly would re-submit the proposed constitution, or that the re-submitted version likely would differ in content from the 1964 version, is completely irrelevant under the legal theory relied upon by the district court below. Its basis of decision was that **any** constitution proposed by a malapportioned legislature is, **ipso facto,** constitutionally defective, without regard to its substantive content. Under this rationale, it is immaterial whether the future General Assembly re-submits the identical document, or for

that matter, such a forward-looking model as that proposed by the National Municipal League.[2] In either case, the result is the same. In the more usual-type situation, where a law is attacked because of some defect inherent in its substance, the repeal or amendment of the law pending review generally is to moot the case, for the reason that the legal issues necessarily are altered. This was the situation in **United States v. Alaska Steamship Co.**, 253 U.S. 113 (1920). Here, the basis of attack is not the substance of the law **per se**, but rather the procedure of its adoption. In this context, the contingency of future legislative action is no different than the threat of any other acts sought to be enjoined in the future, whether they be unfair labor practices, illegal business combinations, or acts of racial discrimination. The procedure or method of adoption is the critical consideration here, and that will not change until the General Assembly is reapportioned.

Lastly, it is not realistically accurate to say that if the injunction is vacated below as concerns the proposed state constitution, it will be time enough then for this Court to resolve the issue, should the General Assembly attempt to re-submit a new constitution, and challenge is made thereto. The vacating below of the decree in this respect leaves undisturbed the fact that a federal court has condemned the constitutional amendment procedure here involved, and that the legal principle implicit therein still stands, obviously to be followed by the Court below which retains jurisdiction (R. 201) all the while. The 1964 special session which

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[2] National Municipal League, Model State Constitution (6th edition 1963).

proposed the constitution enjoined below cost the State of Georgia a sum in excess of one million dollars. It is nothing short of absurdity to assume that the Governor or Legislature would undertake to devote the time and effort to another submission with such an ominous cloud hanging over their heads. Stated differently, vacating the injunction below on mootness grounds would be no less efficacious than continuing it in effect and declaring it nonreviewable. The unsoundness of appellees' position on this issue was very well illustrated by the amusing dilemma confronting them upon oral argument: On the one hand, it was declared that no objection would be made should the injunction be vacated; on the other, appellees were constrained to re-urge their protest should the 1965 General Assembly undertake to re-submit. The end result is that appellees want their relief, but wish to avoid review by this Court.

II

The District Court Was Without Power to Enjoin Submission of the Proposed Constitution

That Courts do not intervene to enjoin the legislative process while in progress is beyond dispute. **Mississippi v. Johnson,** 4 Wall 475, 500 (1866); **New Orleans Waterworks Co. v. New Orleans,** 164 U.S. 471, (1896); **McChord v. L. & N. Railroad Co.,** 183 U.S. 483, 495-6 (1902); **Prentis v. Atlantic Coast Line Co.,** 211 U. S. 210, 228 (1908); **State ex rel Cranmer v. Thorson,** 9 S. D. 148, 68 N. W. 202 (1896); **Drew v. Scranton,** 229 F. Supp. 308 (D. C. Pa. 1963), vacated on other grounds, **Scranton v. Drew,** —U. S.—, 33 L.

W. 3181 (1964), and see, **Johnson v. Genessee County, Michican,** 232 F. Supp. 563 (D. C. Mich. 1964). In only two instances have federal courts sought to delimit the authority of a state legislature pending reapportionment. See **Thigpen v. Myers,** —F. Supp.— (D. C. Wash.), decided October 26, 1964, modifying decree in 231 F. Supp. 938; and **Buckley v. Hoff,** 234 F. Supp. 191 (D. C. Vt. 1964), appeal pending, No. 624, 33 Law Week 3165. In the **Washington Case,** however, the order appears to have been suggested by the state itself, and in any event was issued following a succession of interminable delays by the state. In the **Buckley Case,** the order was simply rendered without discussion or citation of authority.

Viewed merely as one type of relief in a case of this nature, the obvious reply is that accepting the necessary premise of the Court below—that the document reflects malapportionment-caused biases (R. 142)—it also follows that the people are no less capable of resolving this political question than are judges. Nor is this a situation, as suggested by appellees, where a law void because of defects in its substantive content is sought to be made valid through popular referendum, cf. **Lucas v. The Forty-Fourth General Assembly,** 37 7U. S. 713 (1964), for here even the Court below conceded that had the constitution been submitted and ratified, it would have been immune from attack (R. 138), and the very issue at stake here is whether the mere fact of permitting the people to vote on a document in an election in which perfect equality is the rule, violates equal protection. Conceding the proposition advanced below, the scope of the equal protec-

tion clause would vary depending upon the stage at which it is asserted.

On the other hand, viewed as an abstract principle of constitutional law, it would follow that the constitutional initiative provisions in thirteen states[3] would be rendered void, for none of them undertake to require that the initiating body reflect the "one man, one vote" principle. Nor is it any answer, as asserted by appellees' Supplemental Memorandum (p. 4) that the initiative provision affords opportunity to opposing factions, for the existence of a political remedy is irrelevant except as a basis for temporary abstention. **Lucas v. The Forty-Fourth General Assembly,** supra.

The invocation of the relief granted by the district court is particularly incomprehensible here. The effect of prohibiting submission of the 1964 Constitution, adopted by a General Assembly in whose population-based senate 43% of the senators from the 9 urban districts represent 43% of the people, is that the 1945 Constitution remains in effect—a constitution submitted under the identical procedure by a much more malapportioned legislature in which the 9 largest senate districts having over 50% of the state's population had only 16% of the senators. What was done here was tantamount to declaring an existing apportionment statute valid and thereby reviving and falling back on an even more invidiously discriminatory one. The matter is placed in an even stronger light here because of

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[3] National Municipal League, Salient Issues of Constitutional Revision, p. 55 (1961), and see National Municipal League, Model State Constitution, p. 19, 104 (6th Ed. 1963); Graves, State Constitutional Revision, p. 25 et seq. (1960).

the conceded fact that the proposed constitution was much more favorable to urban areas than the existing one. When the district court below first issued its order, it is interesting to note that the City of Atlanta filed a "motion" as **amicus curiae,** seeking modification of the order in light of the City's concern for the provisions of the proposed constitution relaing to "rapid transit, home rule, public finance, and others . . ." (R. 176).

The effect of the relief granted below was not to vindicate the voting rights of **anyone;** to the contrary, the decree denies the voting rights of **all.** Equally objectionable, its tendency is to completely debilitate and further paralyze state governments pending reapportionment. Conceding the validity of what was done here ,where is the line to be drawn? How stands the Code of Georgia of 1933 and all statutes adopted since then? It is the high function of federal courts to preserve state government, not to destroy it, for as was stated almost 100 years ago,

> ". . . (B)ut it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of a National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." **Texas v. White,** 7 Wall. 700, 725, 19 L. Ed. 227 (1869).

III

State Court Determination of the State Law Question

During oral argument, the question was asked as to why the state had not proceeded to institute appropriate action in state courts to secure a resolution of the question concerning the validity under the state constitution of the amending procedure in question.

To begin with, the state was already under an injunction based upon the district court's adjudication of this identical question, and appellants were precluded by considerations of prior jurisdiction, 28 USCA 2283, pendency of prior action, Ga. Code § 3-601, as well as res judicata. Aside from this, the effect of the district court's order was to deny to appellants an opportunity to do just this, had the Court below abstained as suggested by counsel for appellants.[4]

In any event, appellants hereby declare that should the decree be reversed, they will undertake to secure an authoritative determination in state court of this question before re-submission of a new constitution. However, appellants further state that in their opinion, the decision of the Supreme Court of Georgia in **Wheeler v. Board of Trustees of Fargo School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946), is so clear and unambiguous as to preclude doubts or to require further interpretation. Assuming otherwise, however, in view of the concession by the Court below that the question was "doubtful" (R. 168), and particularly in view of the opinion of the Attorney General rendered

[4] Made during oral argument on June 24 (not reported).

May 28, 1964 (Brief on Merits, p. 23) to abstain was the very most that the Court below should have done. See **Louisiana Power & Light Co. v. Thibodaux,** 360 U. S. 25 (1959), for an analogous situation.

IV

Conclusion

This case, more than most, illustrates the unwisdom of a Court's undertaking to inject issues and grant relief neither desired or originally prayed for by the parties. The plaintiffs went before the district court below represented by thirteen of the most prominent lawyers in Georgia, drawn from a wide cross section of the state. It is a reflection upon these eminent counsel to say that their clients were so poorly represented that the Court below had to act **ex meru motu.** Today, no less than during the time of **Dred Scott's Case** (19 How. 323), sound judicial administration counsels against a court's going outside the record and assuming the role of a **censor morum.** The judgment below should be reversed.

Respectfully Submitted,
EUGENE COOK
Attorney General of Georgia

132 Judicial Building
40 Capitol Square
Atlanta, Georgia

E. FREEMAN LEVERETT
Deputy Assistant Attorney General

25 Thomas Street
Elberton, Georgia

Attorneys for Appellants, Ben W. Fortson, Jr., Secretary of State,